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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re JOSEPH FLOREZ,

On Habeas Corpus.

F071299

(Super. Ct. No. VHC304765)

OPINION

APPEAL from an order of the Superior Court of Tulare County. Gary L. Paden, Judge.

Tim Ward, District Attorney, Dan Underwood, Assistant District Attorney, Barbara J. Greaver and Jennifer Fultz, Deputy District Attorneys, for Plaintiff and Appellant the People.

Michael Cross for Defendant and Respondent Joseph Florez.

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INTRODUCTION

The People have filed an appeal pursuant to Penal Code¹ section 1506 contending the trial court erred in granting Joseph Florez's order to show cause on petition for a writ of habeas corpus seeking a new hearing pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). Florez filed his petition after our opinion was issued in his original appeal (*People v. Florez* (Dec. 12, 2013, F064311) [nonpub. opn.]), remittitur

¹All statutory references are to the Penal Code.

issued from this court to the trial court, and the California Supreme Court filed its opinion in *People v. Vargas* (2014) 59 Cal.4th 635 (*Vargas*). Florez's petition was based on *Vargas* and allegations that his trial counsel was ineffective.

The People have raised a number of contentions going to the merits of the petition and a new *Romero* hearing. This appeal, however, was not made after a final order from the trial court as required by section 1506 and must be dismissed for further proceedings before the trial court.

FACTS AND PROCEEDINGS

Florez was found guilty in Tulare County case No. VCF241795 of being a felon in possession of a firearm (former § 12021, subd. (a)(1), now § 29800, subd. (a); count 7). The jury found true a special allegation defendant committed his offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). In a bifurcated proceeding, the trial court found true allegations defendant suffered three prior convictions within the meaning of the three strikes law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(i)).

Defendant appealed, contending the trial court abused its discretion in failing to grant a new trial on the gang enhancement and for denying his motion to sever the felon-in-possession allegation from other allegations also found true by the jury that were subject to a successful motion for new trial granted by the trial court.² We rejected defendant's arguments on appeal and affirmed the judgment. Defendant's petition for review to the California Supreme Court was denied on February 26, 2014 (S216008). This court issued remittitur to the trial court on March 4, 2014. The Supreme Court filed its decision in *Vargas* on July 10, 2014.

On August 19, 2014, defendant filed his petition for a writ of habeas corpus. Defendant contended his prior serious felony conviction for discharging a firearm at an

²The murder allegations were based, in part, on testimony by a jail house informant whose testimony was successfully challenged by defendant in his motion for new trial. The People elected not to retry defendant on the murder-related allegations.

unoccupied dwelling or vehicle was not a strike because there was no documentary evidence that he personally used a firearm.

The second and third prior serious felony convictions were for assault with a firearm and conspiracy to commit assault with a firearm. Defendant argued these two counts were based on the same single act of criminal conduct. Defendant contended *Vargas* prevents a court from treating a single act as two strikes, even though that act can be punished under different statutes. The information for these counts indicates defendant assaulted Louis Rivera with a firearm (count 1, § 245, subd. (a)(2)) and conspired to assault Rivera with a firearm (count 5, §§ 182, subd. (a)(1), 245, subd. (a)(2)). Overt act No. 5 alleged defendant drove his car to block Rivera's car, and overt act No. 8 alleged a codefendant pointed a gun at Rivera. The abstract of judgment indicates the trial court stayed defendant's conspiracy conviction pursuant to section 654.

Defendant's petition also argued his original *Romero* hearing was unfair because his trial counsel was ineffective at the hearing for failing to challenge the prior strike allegations. Defendant set forth transcript testimony from the trial for his second and third strikes to demonstrate the two convictions constituted a single act. Defendant further argued his trial counsel was ineffective for failing to challenge the sufficiency of the gang enhancement allegation in the new trial motion.

On August 27, 2014, the trial court issued an order to show cause on defendant's petition for a writ of habeas corpus. The People filed a return to the petition on September 25, 2014. The People contended conspiracy was separate and distinct from assault with a firearm and *Vargas* therefore did not apply to defendant's convictions for conspiracy to assault with a firearm, and assault with a firearm. Defendant filed a motion for summary disposition of his petition for a writ of habeas corpus on October 16, 2014. The defendant filed a traverse to the People's return on November 20, 2014.

On February 17, 2015, the trial court set the petition for a hearing on April 9, 2015, and issued a transportation order for defendant's presence at the hearing. On

March 17, 2015, the People filed a notice of appeal pursuant to section 1506, “from the February 17, 2015 order of the Superior Court granting relief of the Petition for Writ of Habeas Corpus and setting a new Romero hearing.”

DISMISSAL OF THE PEOPLE’S APPEAL

The People raise several challenges to the merits of defendant’s petition for a writ of habeas corpus seeking a new *Romero* hearing. The fundamental flaw in the People’s appeal is that section 1506 mandates an appeal from a “final order.” The trial court’s order setting a hearing on defendant’s petition does not qualify as such an order. We therefore explain why we dismiss the People’s appeal.

The People’s right to appeal is strictly limited by statute. Courts must respect the limits on review imposed by the Legislature. (*People v. Williams* (2005) 35 Cal.4th 817, 822-823.) An order granting a petition for writ of habeas corpus may be appealed by the People even if it does not discharge a prisoner from custody. (*Jackson v. Superior Court* (2010) 189 Cal.App.4th 1051, 1064.) The People can appeal if their substantial rights are affected by the ruling or judgment of the trial court. (§ 1238, subd. (a)(5); *Jackson v. Superior Court, supra*, at p. 1064.) The orders granting the order to show cause and setting the matter for a hearing on the habeas corpus petition, however, do not affect the substantial rights of the People. They are orders preliminary to a hearing in which the rights of the parties will be determined according to well-established rules of procedure and due process. Section 1238, subdivision (a)(5) does not authorize a People’s appeal given the current procedural posture of the case. If the People have any statutory right to appeal, it is from section 1506.

Section 1506 states in relevant part:

“An appeal may be taken to the court of appeal by the people from a *final order* of a superior court made upon the return of a writ of habeas corpus discharging a defendant or otherwise granting all or any part of the relief sought, in all criminal cases, excepting criminal cases where judgment of death has been rendered, and in such cases to the Supreme Court; and in all criminal cases where an application for a writ of habeas corpus has been

heard and determined in a court of appeal, either the defendant or the people may apply for a hearing in the Supreme Court.” (Italics added.)

In *People v. Superior Court (Gregory)* (2005) 129 Cal.App.4th 324, the trial court granted the defendant’s petition for a writ of habeas corpus based on a claim his waiver of rights and plea bargain was not knowing and intelligent because he was not advised of a possible defense. The People appealed and this court reversed the trial court. In so doing, we recognized other possible bases for relief were raised but not ruled upon by the trial court. (*Id.* at pp. 327-328.) The Supreme Court granted review. Subsequently, the trial court held a hearing while the matter was pending before the Supreme Court and granted relief on different grounds from its original hearing, ordering the People to file an amended information or seek writ review. The People sought writ review. (*Id.* at p. 328.)

In *Gregory*, this court recognized the general rule that a valid notice of appeal vests jurisdiction in the appellate court until determination of the appeal and issuance of the remittitur. The purpose of the rule is to protect the appellate court’s jurisdiction by preserving the status quo until the appeal is decided and to prevent the trial court from rendering the appeal futile by altering the appealed judgment. (*People v. Superior Court (Gregory)*, *supra*, 129 Cal.App.4th at p. 329.) *Gregory* recognized that trial courts may still have some jurisdiction where provided by law creating concurrent jurisdiction with the appellate court. This may include some writ proceedings. (*Ibid.*)

Gregory found the power invested in superior courts to issue writs of habeas corpus cannot be used to invade the jurisdiction of the appellate court, and there were issues raised by the parties still pending before the Supreme Court. (*People v. Superior Court (Gregory)*, *supra*, 129 Cal.App.4th at p. 330.) The one final judgment rule is a fundamental principle of appellate practice prohibiting review of intermediate rulings until final resolution of the case. The theory underlying the rule is piecemeal disposition and multiple appeals in a single action are oppressive and costly, and review of intermediate rulings should await final disposition of a case. An appeal, therefore, cannot

be taken from a judgment that failed to complete the disposition of all causes of action between the parties. (*Ibid.*) The rule does not change simply because habeas corpus proceedings are involved, “and because the statute authorizing an appeal therein refers to a ‘final order’ instead of a ‘final judgment.’” (*People v. Superior Court (Gregory)*, *supra*, at pp. 330-331.) In *Gregory* we issued a writ of mandate directing the trial court to vacate its order. (*Id.* at p. 333.)

Gregory analyzed a case pending before the Supreme Court in which the trial court ruled on a habeas corpus petition. Here, we view the inverse situation in which the People have filed a premature appeal prior to the trial court having the opportunity to rule on a pending habeas corpus petition. Under these circumstances, it is the trial court that is properly vested with jurisdiction to rule on the defendant’s pending petition, not an appellate court.

We find the holding in *Gregory* applicable to this case. The trial court had not conducted a hearing on defendant’s petition nor had it issued a final order as required by section 1506. The court had only issued interlocutory orders: an order to show cause and an order setting the matter for a hearing. Defendant had not yet been granted any form of relief. The People’s statutory right to appeal is limited to section 1506, the statute authorizing a People’s appeal from a trial court’s grant of habeas corpus relief. The People have not appealed from a final order and this appeal must be dismissed.

ISSUES TO BE RESOLVED

Although we have to dismiss this appeal and do not decide the merits of the People’s contentions, we make the following observations to guide the trial court and the parties during habeas corpus proceedings. Although we do not mean to resolve the legal issues raised by defendant or the People, it appears to us that implied in the People’s appeal is the argument the trial court erred in granting the order to show cause. The People argue that every issue raised by defendant’s petition is procedurally barred by one

doctrine or another. We do not find any error in defendant bringing his petition to the trial court or in the trial court's issuance of the order to show cause.

The People argue defendant cannot file a petition for habeas corpus to raise issues that could have been raised in the original appeal but were not. (Generally see *In re Dixon* (1953) 41 Cal.2d 756.) The Supreme Court's decision in *Vargas* constituted a substantial change in the law that may not have been easily anticipated by either defendant's trial counsel or his appellate attorney in the first appeal. (See *People v. Harris* (2013) 57 Cal.4th 804, 840.) The proper procedural approach for defense counsel to follow under defendant's circumstances was to raise the *Vargas* issue based on a change of the law, as well as to assert any issues of ineffective assistance of trial counsel, by filing a petition for a writ of habeas corpus.

The People challenge defendant's attempt in the petition to challenge whether his 1995 conviction for section 247, subdivision (b) was a prior serious felony within the meaning of the three strikes law because defendant believes he can factually demonstrate he did not personally possess a firearm. This point raises factual matters best resolved in the hearing for defendant's petition. The People can raise their legal contentions to the trial court rather than seeking an advisory opinion in advance from this court.

The People argue the criminal objectives of a conspiracy and assault with a deadly weapon are inherently different and, therefore, *Vargas* does not apply to defendant's convictions for sections 182, subd. (a)(1), and 245, subdivision (a)(2) as a matter of law. The People assert that conspiracy is a crime consisting of an agreement, an overt act, and an unlawful act or a lawful act by unlawful means. Generally, conspiracy is a distinct and separate offense from the crime which is the object of the conspiracy. (See *People v. Dolbeer* (1963) 214 Cal.App.2d 619, 625; *People v. Augusto* (1961) 193 Cal.App.2d 253, 256.)

We see no reason, however, why the violation of sections 182, subd. (a)(1), and 245, subdivision (a)(2) cannot factually share the same criminal act and purpose even if

conspiracy could theoretically share a distinct purpose from the crime that was the object of the conspiracy. If the trial court finds this is so, *Vargas* would be applicable to this case because defendant had committed one criminal act that could be charged as a violation of different statutes. We observe the overt criminal act alleged in the information in count 5 is an assault of the victim with a firearm, the same allegation in count 1 for assault with a firearm to the same victim. Indeed, count 5 is alleged as a violation of sections 182, subd. (a)(1), and 245, subdivision (a)(2). When defendant was originally sentenced for these offenses, the sentencing court stayed his sentence for conspiracy pursuant to section 654. Ultimately, the trial court here will have to resolve any factual issues raised by the petition and the People's return.

We can only guess what evidence the parties may have presented, an impossible task without a record based on a full hearing on defendant's habeas corpus petition. We are a court of review, not a tribunal of speculation. (*In re Armando L.* (2016) 1 Cal.App.5th 606, 620-621.) To reiterate, the trial court has not held a hearing on defendant's petition, no factual issues raised in the petition have been resolved, and the arguments of the parties can still be considered by the trial court.

DISPOSITION

The notice of appeal was not from a final order as required by section 1506 and the appeal, therefore, is dismissed.

PEÑA, J.

WE CONCUR:

LEVY, Acting P.J.

DETJEN, J.